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1638

PATENT  
Docket No.: 19603/3391 (CRF D-2702A)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

|            |   |                                    |   |              |
|------------|---|------------------------------------|---|--------------|
| Applicant  | : | Margaret M. Jahn                   | ) | Examiner:    |
|            |   |                                    | ) | A.R. Kubelik |
| Serial No. | : | 09/993,856                         | ) |              |
|            |   |                                    | ) | Art Unit:    |
| Cnfrm. No. | : | 7990                               | ) | 1638         |
|            |   |                                    | ) |              |
| Filed      | : | November 14, 2001                  | ) |              |
|            |   |                                    | ) |              |
| For        | : | RESISTANCE TO GUMMY STEM BLIGHT IN | ) |              |
|            |   | MELON                              | ) |              |

SUPPLEMENTAL COMMUNICATION

**Mail Stop Amendment**  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

In response to the September 21, 2004, office action, applicant submitted, *inter alia*, an Amendment with an accompanying Request for Continued Examination on October 24, 2005. This supplemental communication is hereby submitted to correct an inadvertent typographical error in the Remarks section of the Amendment.

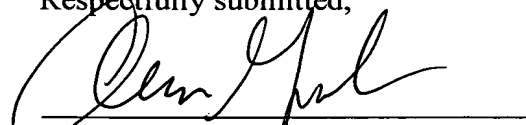
In particular, at page 12, line 11 of the Amendment, the word "not" should be inserted after the word "has" and before the word "based," so that the sentence beginning at page 12, line 11 and ending at page 12, line 12 should now read as follows:

Thus, applicant has not based its arguments on just  
an attack of "individual" references.

(underlining added to indicate inserted text). Applicant respectfully requests that the examiner take note of this typographical error during her review of the Amendment. A copy of page 12 of the as-filed Amendment is enclosed herewith.

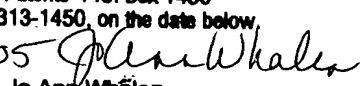
Respectfully submitted,

Date: November 1, 2005

  
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|   |  |
|---|--|
| <b>Certificate of Mailing - 37 CFR 1.8(a)</b>   |  |
| I hereby certify that this correspondence is being deposited with the United States Postal Service as first class mail in an envelope addressed to:<br>Commissioner for Patents P.O. Box 1450<br>Alexandria, VA 22313-1450, on the date below |  |
| <u>November 1, 2005</u><br>Date   | <br>Jo Ann Whalen |

Applicant respectfully submits that the USPTO has either ignored or misinterpreted applicant's prior arguments and evidence presented against the combination of the cited references. For example, in support of its previous response, applicant submitted the Jahn Declaration, which stated the following regarding the cited references:

In particular, nowhere does *Prasad, Norton, Kalb, Zhang*, or Trulson, alone or *in combination*, teach crossing the recurrent and non-recurrent parent plants described in [the] present application in order to yield the gummy stem blight resistant *Cucumis melo* hybrid seeds or plants of [the] present application.

(at ¶13) (emphasis added). Thus, applicant has based its arguments on just an attack of "individual" references. Instead, there is evidence of record that states that the combination of Prasad, Norton, Kalb, and Zhang does not teach the crosses of the recurrent and non-recurrent parent plants of the present invention (see Jahn Declaration ¶13).

For the reasons discussed above, applicant respectfully submits that the obviousness rejection of claims 1 and 18-20 is improper and should be withdrawn.

The rejection of claim 21 under 35 U.S.C. § 103(a) for obviousness over Prasad or Norton in view of Kalb, Zhang, and Trulson et al., "*In vitro* Plant Regeneration in the Genus *Cucumis*," Plant Science 47:35-43 (1986) ("Trulson") is respectfully traversed in view of the cancellation of claim 21.

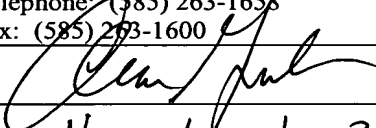
The rejection of claims 22, 39-43, 45, 62-65, and 67-73 under 35 U.S.C. § 102(b) as anticipated by or under 35 U.S.C. § 103 as obvious over Prasad is respectfully traversed. The USPTO has taken the view that the claimed plants/seeds *appear* to be identical to those of Prasad. In particular, the USPTO makes the argument that the claimed plants/seeds and those of Prasad *appear* to be identical, because both sets of plants/seeds are resistant to gummy stem blight *and* have enhanced disease tolerance. The USPTO further argues that, even if the plants/seeds are not identical, any differences would be due to "minor morphological variation" and would not confer a patentable distinction.

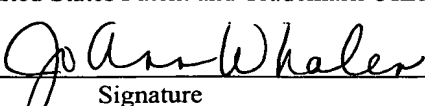
Claims 22 and 45 have been amended to recite that the hybrid seeds/plants produced by the claimed methods contain "at least one gummy stem blight resistance gene selected from the group consisting of *Gsb1*, *Gsb2*, *gsb3*, *Gsb4*, and *Gsb5*." Descriptive support for these amendments are found in the specification at page 9, line 31 to page 10, line 26, and in original claims 29, 30, 52, and 53. With respect to the 35 U.S.C. § 102(b) rejection



|   |   |                        |                          |
|---|---|------------------------|--------------------------|
| <b>TRANSMITTAL FORM</b><br>(to be used for all correspondence after initial filing) |   | Application Number     | 09/993,856               |
|   |   | Filing Date            | November 14, 2001        |
|   |   | First Named Inventor   | Margaret M. Jahn         |
|   |   | Group Art Unit         | 1638                     |
|   |   | Examiner Name          | A.R. Kubelik             |
| Total Number of Pages in This Submission  | 3 | Attorney Docket Number | 19603/3391 (CRF D-2702A) |

| ENCLOSURES (check all that apply)   |   |   |
|---|---|---|
| <input type="checkbox"/> Fee Transmittal Form<br><input type="checkbox"/> Fee Attached<br><input type="checkbox"/> Amendment / Reply (\$ _____)<br><input type="checkbox"/> After Final<br><input type="checkbox"/> Affidavits/declaration(s)<br><input type="checkbox"/> Extension of Time Request (\$ _____)<br><input type="checkbox"/> Express Abandonment Request<br><input type="checkbox"/> Information Disclosure Statement (\$ _____)<br><input type="checkbox"/> Certified Copy of Priority Document(s)<br><input type="checkbox"/> Response to Notice to File Missing Parts/Incomplete Application (\$ _____)<br><input type="checkbox"/> A copy of the Notice to File Missing Parts under 37 CFR 1.52 or 1.53 | <input type="checkbox"/> Assignment Papers (for an Application)<br><input type="checkbox"/> Drawing(s)<br><input type="checkbox"/> Declaration and Power of Attorney<br><input type="checkbox"/> Licensing-related Papers<br><input type="checkbox"/> Petition (\$ _____)<br><input type="checkbox"/> Petition to Convert to a Provisional Application<br><input type="checkbox"/> Power of Attorney, Revocation Change of Correspondence Address<br><input type="checkbox"/> Terminal Disclaimer (\$ _____)<br><input type="checkbox"/> Request for Refund<br><input type="checkbox"/> CD, Number of CD(s) _____ | <input type="checkbox"/> After Allowance Communication to Group<br><input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences<br><input type="checkbox"/> Appeal Communication to Group (\$ _____) (Appeal Notice, Brief, Reply Brief)<br><input type="checkbox"/> Proprietary Information<br><input type="checkbox"/> Status Letter<br><input type="checkbox"/> Application Data Sheet<br><input type="checkbox"/> Request for Corrected Filing Receipt with Enclosures<br><input checked="" type="checkbox"/> A self-addressed, prepaid postcard for acknowledging receipt<br><input type="checkbox"/> Check in the amount of \$ _____<br><input checked="" type="checkbox"/> Other Enclosure(s) (please identify below):<br><input checked="" type="checkbox"/> Supplemental Communication (1 page)<br><input checked="" type="checkbox"/> A copy of page 12 of the as-filed Amendment, which was filed on October 24, 2005 in response to the September 21, 2004, office action. |
| Remarks   |   | <input checked="" type="checkbox"/> The Commissioner is hereby authorized to charge any additional fees required or credit any overpayments to Deposit Account No. 14-1138 for the above identified docket number.  |

| SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT |  |
|--|--|
| Firm or Individual name                    | Andrew K. Gonsalves, Esq.<br>Nixon Peabody LLP<br>Clinton Square, P.O. Box 31051<br>Rochester, New York 14603-1051<br>Telephone: (585) 263-1658<br>Fax: (585) 263-1600 |
| Signature                                  | <br>Registration No. 48,145   |
| Date                                       | November 1, 2005   |

| CERTIFICATE OF MAILING OR TRANSMISSION [37 CFR 1.8(a)]  |                  |
|---|------------------|
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| <input type="checkbox"/> transmitted by facsimile on the date shown below to the United States Patent and Trademark Office at (703) _____   |                  |
| Date  | November 1, 2005 |
| <br>Signature<br>Jo Ann Whalen<br>Typed or printed name   |                  |